88-344

Supreme Court, U.S.
FILED
JUL 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NUMBER:

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1988

G. ROBIN OSCAR,

Petitioner

vs.

CLOVERVALE FOODS PROCESSING, INC.,

Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOURTH CIRCUIT

William R. Hurst, Esq.
P. O. Box 88394
Dunwoody, GA. 30356
(404) 399-5485

QUESTIONS PRESENTED

1. Did the trial court deny the Petitioner's right to jury trial under the U.S. Constitution, Amendment 7?

2. Does a United States District Court have the right to reweigh the facts presented to the jury and set aside a verdict based upon inferences and conclusions reached which the Court feels are more reasonable than those found by the jury?

3. In violation of precedent can the trial court weigh the evidence and conclude that the verdict is against that weight of evidence?

4. Is the federal judiciary to continue in its historical practice of eroding the guarantee of the Seventh Amendment?

5. Can a trial court now ignore the mandate regarding JNOV and new trial motions that all conflicts in the evidence be resolved in the nonmoving party's favor?

INDEX

Table of Contents

Questions Presented

	Page
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	18

Index to Appendices

Appendix "A" Opinion of Fourth Circuit Court of Appeals

Order of District Court of South Carolina

Order Denying Rehearing

Table of Citations

Arkwright Mut. Ins. Co. v. Philadelphia Electric Co. (1970), CA 3 Pa), 427 F 2d 1273. p. 12-13

Berner v. British Commonwealth Pacific Airlines, Ltd. (1965), CA 2 NY) 346 F 2d 532, cert den 382 US 983, 15 L ED 2d 472, 86 S Ct 559. p. 13

Berry v. United States, 312 U.S. 450 (1941). p. 16

Corbett v. Curtis (ME) 225 A2d 402. p. 12

DePinto v. Provident Life Ins. Co. (CA 9th, 1963), 323 F 2d 826. p. 14

Douglas Aircraft Co. v. Kerns (1947, CA 10 Okla) 164 F 2d 1007. p. 13-14

Farmers State Bank v. Dravo Corp. (1963) CA u Ill) 321 F 2d 38. p. 13

Galloway v. United States, 319 US 372. p. 15

Graham v. Whitaker, M.D., 282 S.C. 393, 321 SE 2d 40. p. 13

Jacob v. City of New York, 315 US 752. p. 14

Kennedy v. Custom Ice Equipment Co., Inc., 271 S.C. 171, 246 SE 2d 176 (1978). p. 13

Matthews v. Porter, 239 S.C. 620, 124 SE 2d 231. p. 13

Meistrich v. Casino Arena Attractions, Inc., 31 NJ 44, 155 A 2d 90, 82 ALR 2d 1208. p. 12

National Equipment Rental, Td., v. Stanley (1959, DC NY) 177 F Supp 583, affd (CA2 NY) 283 F 2d 600. p. 14

Nugen v. Hildbrand, 145 W VA 420, 114 SE 2d 896; 57 Am Jur 2d Negligence 282. p. 12

Readnour v. Commercial Standard Ins. Co. (CA 1oth, 1958) 253 F 2d 907. p. 14

Reis v. Sanders (1964), DC Miss) 34 FRD 468. p. 14

Townes Associates Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E. (2d) 773 (1976). p. 14

Watts v. Great Atlantic and Pacific Tea Company, Inc., Case No. 87-8441, April 15, 1988. p. 9

Restatement, Torts 2d §496D, 57 Am Jur 2d Negligence 281. p. 12

IN THE
SUPREME COURT OF THE UNITED STATES

_____ TERM, 1988

G. ROBIN OSCAR,

Petitioner

vs.

CLOVERVALE FOODS PROCESSING, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on April 27, 1988.

OPINION BELOW

The Opinion of the Court of Appeals is appended hereto as Appendix "A"; Denial of Petition for Rehearing also appended.

The Order of the District Court granting the defendant's motion for a judgment notwithstanding the verdict is included in the appendix.

JURISDICTION

The original judgment of the Court of Appeals was entered on October 28, 1987; a petition for rehearing was timely filed on November 12, 1987 and was finally denied on April 27, 1988. The jurisdiction of this Honorable Court is invoked under Title 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the U.S. Constitution: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF FACTS

1. On October 20, 1986, a jury trial was held in the case of G. Robin Oscar v. Clovervale Foods Processing, Inc., in the United States District Court

For the District of South Carolina, Greenville Division, Civil Action No: 6:85-2717-16.

2. The jury returned a verdict for the Plaintiff in the amount of $154,000.00 in actual damages.

3. The Defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial and the motion was granted by Order entered January 29, 1987.

4. An appeal was timely filed with the United States Court of Appeals for the Fourth Circuit.

5. An Order was entered affirming the District Court's Order on October 28, 1987.

6. Petition for Rehearing was timely filed on the 12th of November, 1987 and was denied by Order filed April 27, 1988.

7. In its Order granting the JNOV the District Court related the basic story of the case as follows:

A. Plaintiff visited Defendant's plant and was taken on tour by Defendant Vice President Cawrse. (Testimony states the visit was by invitation.)

B. Defendant Cawrse brought Plaintiff onto dock area and began directing the unloading of drums from a truck trailer.

C. Defendant Cawrse asked Plaintiff to help.

D. Plaintiff positioned himself at rear of trailer. (Testimony showed that Defendant Cawrse placed Plaintiff at rear of trailer.)

E. After working 10 or 15 minutes a drum struck Plaintiff as he turned from putting the last drum on the

dock.

F. Plaintiff fell backwards, twisting his leg and striking his head on a nearby forklift.

8. It is important to point out that the Plaintiff was an invited guest to the plant, was placed in harm's way by the Defendant's people and hurt by Defendant's employees.

9. The Fourth Circuit said:

A. Defendant had invited Plaintiff to visit the plant.

B. Defendant Cawrse directed the unloading of the drums.

C. Plaintiff was stationed at the rear door of the trailer.

D. After about 15 minutes of work Plaintiff was struck by a drum as he was turning.

E. "Although it is possible to

infer that one of the appellee's employees rolled the barrel in a negligent manner, the evidence in the record equally supports an inference that the appellant was slower than usual in turning back around, or that he was not as alert as he should have been."

10. Both courts below have violated the applicable standards of review and correction of alleged errors by allowing the trial court to substitute its personal view on what to infer from the facts presented for that of the jury.

REASONS FOR GRANTING THE WRIT

1. In a mind-bogglingly similar case in the 11th Circuit, the Court of Appeals in connection with item 10 above, reversed the district court's grant of a JNOV to Great Atlantic and Pacific Tea Company (A&P), holding that reasonable

persons could have differed as to whether Watts was contributorily negligent.

Watts, a delivery man, was struck by a forklift in an A&P warehouse in Richmond, Virginia. The warehouse had no pedestrian walkways, and the inventory was stacked more than six feet high. Watts brought suit in the U.S. District Court for the Northern District of Georgia and a jury awarded him substantial damages. Finding that Watts was guilty of contributory negligence as a matter of law, and noting that under Virginia law, contributory negligence completely bars a negligence action, the court granted A&P's motion for new trial if the JNOV grant was overturned.

The Eleventh Circuit reversed and remanded for reinstatement of the jury's award, holding that the question of

Watts' contributory negligence had been properly determined by the jury, particularly since Watts, as an invitee, was not required to be on the lookout for dangers that were not open and obvious. Watts v. Great Atlantic and Pacific Tea Company, Inc., Case No. 87-8441, April 15, 1988.

2. The following facts were established without dispute in trial, the only honest challenge to these could be in extent - not in existence:

A. Rob Oscar visited the Defendant's plant at Defendant's request.

B. Rob was a healthy adult male prior to the incident on July 12, 1985.

C. Rob was injured to some extent by the fall.

D. By trial time Rob had gone through knee surgery and possibly needed

neck surgery as a result of the fall.

E. By trial time Rob had already spent $9,000.00 in medical expenses on the knee and faced heavy additional expenses.

F. At the plant Rob, by invitation from the boss, became involved in helping unload 55 gallon drums from a truck.

G. After helping for a few minutes, during which time the Defendant boss figured out how to speed up the process, a barrel rolled into Plaintiff knocking him down and hyperextending his knee.

H. Rob turned for a barrel, but was struck by one rolling prematurely.

I. The barrel was rolled by a Defendant employee who obviously was not being concerned about the safety of Rob.

The jury obviously agreed. They did send the trial judge a question early in their deliberations as to "who awarded punitive damages". The court below pointed this out as a point of confusion. However the court's charges were brutally defensive as it was; the jury merely got mad at the Defendant's acts of callous indifference at placing Plaintiff in jeopardy and then hurting him as they did.

3. Material facts and laws have been overlooked in the decision. Specific facts and supporting laws of importance are pointed out here.

a. The fact that the appellant was an invitee and therefore certain duties were owed him. Graham v. Whitaker, 321 SE 2d 40, 282 S.C. 393.

b. The fact that the appellant did not voluntarily and knowingly assume

the risk of his injuries. Restatement, Torts 2d §496D, 57 Am Jur 2d Negligence 281. 57 Am Jur 2d Negligence 282, restatement of Meistrich v. Casino Arena Attractions, Inc. 31 NJ 44, 155 A2d 90, 82 ALR 2d 1208. Corbett v. Curtis (ME) 225 A2d 402; Nugen v. Hildbrand, 145 W VA 420, 114 SE 2d 896; 57 Am Jur 2d Negligence 282.

c. The fact that there is more than one reasonable inference that can be drawn from the evidence, (Court of Appeals, Per Curiam, p. 8), that there are controverted issues of fact upon which reasonable minds could differ, that S.C. local court rules determine that there is sufficient evidence to support inferences of defendant's negligence and that these are jury questions. Arkwright Mut. Ins. Co. v. Philadelphia Electric Co.

(1970), CA 3 Pa), 427 F 2d 1273. Farmers State Bank v. Dravo Corp. (1963), CA 7 I11) 321 F 2d 38. Kennedy v. Custom Ice Equipment Co., Inc., 271 S.C. 171, 246 SE 2d 176 (1978). Matthews v. Porter, 239 S.C. 620, 124 SE 2d 231. Graham v. Whitaker, M.D., 282 S.C. 393, 321 SE 2d 40.

d. The fact that the court overlooked statements of law given in the charges and stipulated by plaintiff and defendant to be correct statements of law.

e. The fact that the appellant's rights under the Seventh Amendment of the Constitution of the United States were violated. Berner v. British Commonwealth Pacific Airlines, Ltd. (1965), CA 2 NY) 346 F 2d 532, cert den 382 US 983, 15 L ED 2d 472, 86 S Ct 559. Douglas Aircraft

Co. v. Kerns (1947, CA 10 Okla) 164 F 2d 1007. Ries v. Sanders (1964, DC Miss) 34 FRD 468. National Equipment Rental, Td., v. Stanley (1959, DC NY) 177 F Supp 583, affd (CA2 NY) 283 F 2d 600. Readnour v. Commercial Standard Ins. Co. (CA 10th, 1958) 253 F 2d 907. Townes Associates Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E. (2d) 773 (1976). DePinto v. Provident Life Ins. Co. (CA 9th, 1963), 323 F 2d 826.

4. When the Trial Court weighs testimony as a "13th juror" and takes away the verdict of six, as did Judge Henderson, it invades the protection that a jury guarantee provides. In Jacob v. City of New York, 315 US 752, the Supreme Court reviewed the Trial Judge's directed verdict for the Defendant wherein he held that the Petitioner had

failed to provide sufficient facts to warrant a submission of the negligence issue to the jury. The case involved the selection of a proper tool by a ferry-boat "water tender" under a Jones Act case. The evidence was primarily concerned with knowledge and foreseeability. The proof of possible negligence on the Defendant's part was minimal. The Court said, "Without doubt, the case is close and a jury might find either way. But that is no reason for a Court to usurp the function of the jury." (Emphasis added)

Following the cutting away at the sanctity of jury decisions by the various circuits and the US. Supreme Court Justice Black, in a dissenting opinion in Galloway v. United States, 319 US 372, said: " . . . today's decision marks a

continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." (p. 397)

In Berry v. United States, 312 U.S. 450 (1941), the Court remarked that the new rule has given ". . . district judges, under certain circumstances . . . the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judge any part of the exclusive power of juries to weigh evidence and determine contested issues of facts - a jury being the constitutional tribunal provided for trying facts in courts of law." Ibid. 452-453 (The new rule being the judge's ability to direct

a verdict on the ground of "insufficiency" of the evidence.)

We submit that it was up to the jury to weigh the evidence in this case and to determine the obviously contested issues of fact. The jury reached conclusions, as only they are allowed to do, that the Defendant was negligent and the Plaintiff was not (at least to the extent urged by assumption of risk and contributory negligence rules). Certainly, the jury must decide whether a particular act amounts to negligence under proper instruction from the Court. In this case, the combined life experiences of six jurors guided them toward a just and proper verdict.

5. There seems to be a problem for the courts in deciding between "probable" cause and "possible" cause and therefore,

in allowing the jury to exercise a decision.

It is certainly "possible", as are all things, that some unknown force propelled the barrel into Mr. Oscar when he was not looking, but there is no evidence to indicate that. No witnesses testified to unusual earth tremors, flashes of lightning, or ghostly apparitions on the scene. The "probability", on the other hand, is that the Defendant's employee rolled the barrel carelessly or intentionally while Mr. Oscar was not looking - striking him down like a bowling pin. Given that probability, the question is for the jury.

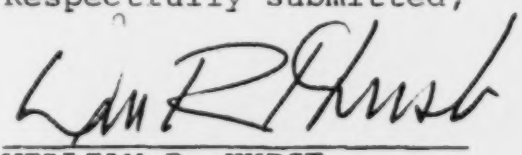
CONCLUSION

The Petitioner in this cause, a Georgia resident, chose the federal forum in Greenville, S.C. against an Ohio owned

South Carolina peach processing company. Constitutional due process was a prime consideration. All went well through verdict and the original judgment. Thereafter it became a nightmare because of presumed and excessive authority exercised by the trial court and because of misinterpretation and confusion of the Seventh Amendment with possibles and probables. This Honorable Court needs to grant current guidelines to follow.

We pray for a grant of certiorari to fully review the matter.

Respectfully submitted,

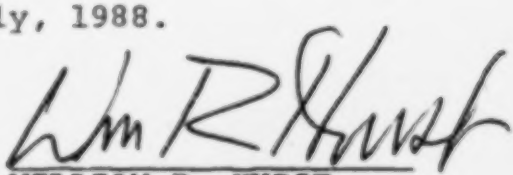


WILLIAM R. HURST
Attorney for Petitioner
G. Robin Oscar

CERTIFICATE OF SERVICE

I certify that pursuant to Rule 28 Supreme Court and at time of filing herein I have served attorney James D. Brice and attorney Frank Huger Gibbes III, both of Rainey, Britton, Gibbs & Clarkson, representing the respondent below with three copies of the Petition for Writ of Certiorari at 330 East Coffee Street, P.O. Box 10589, Greenville, S.C. 29603. Good and sufficient postage was placed thereon to carry same to its proper destination.

This 26th of July, 1988.



WILLIAM R. HURST

Suite A
1876 Independence Sq.
Dunwoody, GA 30338
(404) 399-5485

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2013(L)

G. ROBIN OSCAR;

Plaintiff-Appellant

v.

CLOVERVALE FOODS PROCESSING, INC.;

Defendant-Appellee

No. 87-2049

G. ROBIN OSCAR;

Plaintiff-Appellant

v.

CLOVERVALE FOODS PROCESSING, INC.;

Defendant-Appellee

Appeal from the United States District Court for the District of South Carolina, at Greenville. Karen L. Henderson, District Judge. (C/A No. 85-2717)

Argued: October 5, 1987

Decided: October 28, 1987

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, PHILLIPS, Circuit Judge and BUTZNER, Senior Circuit Judge.

William Ransom Hurst, Sr. (Hurst & Barber; John W. DeJong on brief) for Appellant; James D. Brice (Deborah Casey Brown; Rainey Britton, Gibbes & Clarkson, P.A. on brief) for Appellee.

PER CURIAM:

The question presented is whether the district court properly granted the appellee's motion for judgment notwithstanding the verdict.

On July 12, 1984, the appellant, G. Robin Oscar, was visiting the peach processing plant of appellee, Clovervale Foods Processing, Inc. ("Clovervale"). Appellee had invited Oscar to visit the plant so that he could view some fruit that it wanted him to sell. During the visit, Richard Cawrse, who was then a vice president of Clovervale, took appellant on a tour of the processing plant. At the end of the tour Cawrse and Oscar came upon some men unloading a trailer filled with empty 55-gallon barrels, each of which weighed about 35-40 pounds. Cawrse gave the men

instructions on how to unload the barrels faster by setting up a brigade in which one or two men located in the front part of the trailer would roll the barrels to another man located by the unloading dock at the rear door of the trailer. The man stationed by the unloading dock would stop the rolling barrels and stand them up on the dock so that the rest of the men positioned by the doorway of the building and within the building could continue the transfer. Cawrse and Oscar joined appellee's employees in unloading the barrels; appellant was stationed at the rear door of the trailer.

Appellant testified that he had been assisting in unloading barrels for about fifteen minutes when, as he was turning around after placing a barrel on the un-

loading dock, he was struck by a barrel. The blow caused his foot to slip off the dock into the separation between the unloading dock and the trailer, and this caused him to fall backward onto a tow motor, striking his head.

The only witness to appellant's fall was an employee of appellee, Talmade King, who had been rolling the barrels to appellant from the back of the trailer. King stated that he only caught a glimpse of appellant falling. He testified that the barrels were being rolled a distance of about 20 feet from near the front to the back of the trailer at the time appellant fell; that he would not roll the next barrel until appellant had turned around; and that appellant fell after he had already picked up a barrel and turned around.

After the jury found in favor of appellant, appellee moved for a judgment notwithstanding the verdict. The district court granted the appellee's motion based on a finding that, among other things, the only reasonable inference that could be drawn from the evidence was that appellant voluntarily and knowingly assumed the risk present at the time of his fall.

In determining whether the district court properly granted appellee's motion, we note that in a diversity case the sufficiency of evidence to create a jury question is a metter governed by federal law. Owens By Owens v. Bourns, Inc., 766 F 2d 145, 149 (4th Cir.), cert.

denied, 106 S.Ct. 608 (1985).[1] The trial court is required to grant a judgment notwithstanding the verdict even if there is some evidence supporting the opposite position so long as there are no controverted issues of fact upon which reasonable minds could differ. Whalen v. Roanoke County Board of Supervisors, 769 F 2d 221, 227 (4th Cir. 1985) (Ervin, J. concurring in part and dissenting in part)(adopted as opinion of the Court, 797 F 2d 170, 171 (4th Cir. 1986)(en banc)). However, the trial court must judge the evidence in the light most favorable to the party against whom

---

[1]The law of South Carolina governs the substantive issues of whether appellee was negligent and whether he assumed the risk of his injuries.

the motion is made, and it must give that party the benefit of all reasonable inferences from the evidence. 9 Wright & Miller, Federal Practice and Procedures § 2524 at 543-45 (1971).

We agree with the district court that the only reasonable inference that can be drawn from the evidence is that appellant assumed the risk of his injury. Under South Carolina law, assumption of risk is available as a defense in actions where there is no contractual relationship between the parties. Honea v. West Virginia Pulp and Paper Company, 380 F 2d 704, 707 (4th Cir. 1967). See also Baker v. Clark, 233 S.C. 20, 103 S.E. 2d 395 (1958). Further, the trial court may find that as a matter of law a party assumed the risk "where it clearly appears either that the plaintiff

had knowledge of and appreciated the danger or that the danger was so obvious or apparent that knowledge should have been imputed to him." Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 495 (S.C. Ct. App. 1986). The trial court must also determine whether the risks assumed were or were not the proximate cause of the plaintiff's injury. Turner v. Sinclair Refining Company, 239 S.C. 620, 173 S.E.2d 356, 359 (1970).

In the instant case, appellant freely and voluntarily engaged in an activity with appellee's employees that presented an apparent danger, and therefore he is regarded as "impliedly agreeing to look out for himself and to relieve the defendant of responsibility." Id. Appellant had been unloading the barrels

for approximately fifteen minutes before the accident occurred. During this time he was aware of the three to six inch gap between the truck and the dock, and he also testified that the barrels were not all rolled in the same manner. As he testified, the barrels: "could go to here [indicating a spot on a diagram] or could go crossways or whatever way it rolled down the track." "And the stopper, if you will, the catcher could move back and forth across here [indicating an area on the diagram] stopping the barrel . . ." (App. at 86). "[T]he barrel could go straight down the middle, straight down the side; it could go at an angle. You moved to catch the barrel." (App. at 87-8). Most significantly, appellant testified that "sometimes you reached in because the barrel came slow or stood

back to catch it because it came a little faster." (App. at 87). The unpredictable variations in the direction and speed the barrels traveled created a clear risk that should have alerted appellant to the danger of his position. Despite his knowledge that the barrels varied in both the angle and speed at which they traveled, appellant voluntarily continued to participate in the work. In a situation where one or two men are rolling barrels to the back entrance of a trailer at varying speed and angles, the risk that the "catcher" will be struck by a barrel while he is not fully alert is "so obvious or apparent that knowledge should be imputed to him." Ballou, 352 S.E. 2d at 495.

We also agree with the district court that the evidence presented at trial

was too insubstantial to support a finding of negligence on the part of the appellee. Appellant testified at trial that: (1) he did not know who rolled the barrel; (2) he did not see the barrel rolling toward him; (3) he does not know how fast the barrel was traveling; and (4) he does not know what direction it came from. Although it is possible to infer that one of the appellee's employees rolled the barrel in a negligent manner, the evidence in the record equally supports an inference that the appellant was slower than usual in turning back around, or that he was not as alert as he should have been. An issue can only be submitted to the jury when it is supported by evidence that shows a probability and not a mere possibility of proof. Whalen v. Roanoke County Board of Supervisors,

769 F 2d 221, 227 (4th Cir. 1985)(Ervin, J. concurring in part and dissenting in part)(adopted as opinion of the Court, 797 F 2d 170, 171 (4th Cir. 1986)(en banc)). The only evidence produced by the appellant to establish that an employee of appellee rolled the barrel in a negligent manner was Oscar's testimony that the barrel struck him while he was not looking. In the context of the record this does not create a probability of negligence on the part of the appellee. Therefore, we base our decision to affirm the judgment of the district court on this ground as well.[2]

---

[2]The district court did not address appellee's argument that it was also entitled to the defense of contributory negligence, and we need not address that issue on appeal.

In sum, we agree with the district court's conclusion that the only reasonable inference to be drawn from the evidence presented at trial is that appellant assumed the risk of his injury, and that, moreover, there is insufficient evidence in the record to support a finding of negligence on the part of appellee.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

		Filed
G. ROBIN OSCAR,	*	
	*	Jan 29, 1987
Plaintiff	*	CIVIL ACTION NO.
	*	
v.	*	6:85-2717-16
	*	
CLOVERVALE FOODS PROCESSING, INC.,	*	ORDER
	*	
Defendant	*	

This matter is before the Court on the motion of defendant Clovervale Foods Processing, Inc. ("Clovervale") for a judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b) or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59(a). The plaintiff, G. Robinson Oscar, Jr., brought this action under the diversity jurisdiction of this Court seeking recovery for injuries he received when he was struck by an

empty 55-gallon drum while visiting the defendant's peach processing plant as a business invitee. A jury trial was held on October 20, 1986, and the case was submitted to the jury on the plaintiff's negligence theory. The jury returned a verdict for the plaintiff in the amount of $154,000 in actual damages. For the reasons stated below, the Court grants the defendant's motion for a judgment notwithstanding the verdict and conditionally grants the defendant's motion for a new trial pursuant to Fed. R. Civ. P. 50(c).

I.

In the summer of 1984, the plaintiff was a forty-five year old independent food broker who had a food brokerage contract with Clovervale. On July 12, 1984, he made a business visit to Clovervale's

peach processing plant in Pickens County, South Carolina. During his visit, Clovervale Vice-President Richard Cawrse took him on a tour of the facility. Toward the end of the tour, Cawrse and the plaintiff came upon some Clovervale employees unloading empty 55-gallon drums from a 35 to 40 foot semi-truck trailer and rolling the drums into the plant.

After watching his employees' method of unloading the drums, Cawrse stepped in and began directing the operation himself. According to the plaintiff's testimony, Cawrse asked the plaintiff to lend a hand. The plaintiff was a recreational athlete who enjoyed physical activity and he readily agreed to assist in unloading the trailer.

The plaintiff positioned himself on the threshold between the rear door of the

trailer and the loading dock. His function in the unloading process was to stop the drums, which two employees took turns rolling toward him from inside the trailer, and turn them up on their end on the loading dock. The plaintiff had been engaged in this activity for approximately ten to fifteen minutes when, according to the plaintiff's testimony, a drum struck him as he turned from putting the last drum on the loading dock. The plaintiff fell backwards, twisting his leg and striking his head on a nearby forklift.

Cawrse went over to the plaintiff, helped him to his feet and took him back to the plant office in order to treat a cut on the plaintiff's head. After resting a while and eating a small lunch, the plaintiff went on to tour Clovervale's warehouse with Cawrse before driving to

a medical clinic to receive further treatment for his cut. Later that afternoon, the plaintiff drove back to his home in Clarksville, Georgia, where he went to bed. The plaintiff subsequently received medical treatment for injuries to his ankle, knee and neck.

At trial, the plaintiff's case consisted of testimony from the plaintiff concerning the accident and his injuries, the deposition testimony of two doctors concerning the plaintiff's injuries and the testimony of Mrs. Oscar concerning her husband's injuries. The defendant called Richard Cawrse and Clovervale employees Talmadge King and David Lewis to testify about the accident and its aftermath. The doctor who treated the plaintiff's head wound the day of the accident also testified for the defendant.

At the close of both the plaintiff's case and its own case, the defendant moved for a directed verdict. The Court noted its reservation about the sufficiency of the evidence on the negligence claim, but denied both motions. Following the jury verdict for the plaintiff, the defendant made a timely motion for a judgment notwithstanding the verdict or alternatively for a new trial.

II.

In ruling on a motion for judgment notwithstanding the verdict, the Court must consider the evidence in the light most favorable to the nonmoving party, resolving all conflicts in that party's favor. Whalen v. Roanoke County Bd. of Supervisors, 769 F. 2d 221, 227 (4th Cir. 1985) (Ervin, C.J. concurring in part and dissenting in part)(adopted as opinion of the Court, 797

F.2d 170, 171 (4th Cir. 1986)(en banc)). "If there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party, the motions should be denied, and the case submitted to the jury." Wyatt v. Interstate & Ocean Transport Co., 623 F2d 888, 891 (4th Cir. 1980). Evidence is not sufficiently substantial, however, when it shows only a "mere possibility" as opposed to a "probability" of proof. Whalen, 769 F.2d at 227; Mayberry v. Dees, 663 F. 2d 502, 510 (4th Cir. 1981); Ralston Purina Co. v. Edmunds, 241 F.2d 164, 168 (4th Cir.) cert. denied, 353 U.S. 974 (1957); see also Mann v. Bowman Transportation, Inc., 300 F2d 505, 509 (4th Cir. 1962)

("[J]uries cannot be permitted to speculate in a void of evidence.")

Applying this standard here, the Court concludes the evidence introduced at trial is insufficient as a matter of law to permit an inference that the defendant was negligent or that any negligence on the defendant's part could have proximately caused the plaintiff's injuries. In order to prevail on a negligence claim under South Carolina law, the plaintiff has the burden of proving by direct or circumstantial evience the defendant or one of its employees acted in a negligent manner and such negligence was the proximate cause of the plaintiff's injuries. See e.g., Howard v. Riddle, 266 S.C. 149, 221 S.E. 2d 865 (1976).

In this case, the only testimony directly relating to the plaintiff's fall

came from the plaintiff himself and from Talmadge King, one of the two Clovervale employees inside the truck when the accident occurred. The plaintiff testified on direct examination he willingly agreed to help unload the trailer. He testified there was nothing particularly demanding about the job itself, as his task was simply to stop the drums and turn them up on their end on the dock. The plaintiff performed this task for ten to fifteen minutes before, according to the plaintiff's testimony, a drum struck him as he was turning from placing another drum on the dock. The evidence indicates the plaintiff was facing the drum when it collided with him and he fell backwards after the impact. On cross examination, the plaintiff admitted he could both see and hear the drums as they came toward

him, but he neither saw nor heard the drum that struck him. In addition, the plaintiff admitted he was unable to determine who had rolled the drum or how fast the drum was traveling.

Talmadge King testified that, from the time Oscar began stopping drums until his fall, King varied his procedure in no way. He stated he did not roll a drum to Oscar until Oscar had finished placing the previous drum on the dock and had turned around to face the interior of the trailer. With respect to the plaintiff's fall, King testified he saw the plaintiff stop the drum that King had just rolled but that he caught only a glimpse of the plaintiff's fall out of the corner of his eye because he was turning to reach for another drum.

The Court finds the evidence to be

too insubstantial to support a verdict in the plaintiff's favor. At best, the evidence suggests only a possibility that the defendant acted in a negligent manner, and any inference of negligence would have to be based on speculation and conjecture. In particular, there is no evidence that the drum which struck the plaintiff was rolled at a time interval or rate of speed different from any of the drums previously rolled, or that the defendant acted in any manner indicating a want of care on its part. The plaintiff's testimony was simply that he fell after being struck by a drum as he positioned himself to receive that drum. This fact alone cannot support an inference that the defendant acted negligently.

The Court also finds there is a lack of substantial evidence to support an

inference that any negligence on the part of the defendant proximately caused the plaintiff's injury. Indeed, the only reasonable inference that can be drawn from the evidence is that the plaintiff voluntarily and knowingly assumed the risk present at the time of his fall and that his own actions were the proximate cause of his injuries. See Baker v. Clark, 233 S.C. 20, 103 S.E. 2d 395 (1958). The plaintiff testified that he willingly agreed to help unload the drums when asked by Cawrse, a task he was under no obligation to perform. He admitted that his task was not difficult and the evidence indicates that he even requested King and King's co-worker to increase the pace. The plaintiff unloaded drums for ten to fifteen minutes before his fall without incident. He was in a position where he

admittedly could both see and hear the drums approaching him. Under the circumstances, the only reasonable inference to be drawn is that the plaintiff knowingly assumed the risk of his actions and that his own actions were the proximate cause of his injuries.

For these reasons, the Court grants the defendant's motion for a judgment notwithstanding the verdict.

III.

Under Fed. R. Civ. 50(c), the Court also conditionally rules on the defendant's motion for a new trial. Because the jury's verdict is both against the clear weight of the evidence and excessive in amount, the Court grants the defendant's motion.

The granting or denial of a new trial motion is a matter resting in the sound discretion of the trial court. Aetna

Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 354 (4th Cir. 1941), and the court must grant such a motion if, based on the court's own view of the evidence and the credibility of the witnesses, the court concludes that the verdict is against the clear weight of the evidence. Wyatt, 623 F.2d at 891-92. The court also has the discretion to grant a new trial if the size of the verdict is either excessive or against the clear weight of the evidence. Virginia Ry Co. v. Armentrout, 166 F.2d 400 (4th Cir. 1948); 11 Wright and Miller, Federal Practice and Procedure § 2807 (1973).

On review of the evidence, the Court concludes the jury's verdict in favor of the plaintiff is against the clear weight of the evidence. As discussed in Section II above, the plaintiff's sole

evidence that a negligent act occurred consisted of the fact that the plaintiff was struck by a drum as he turned to stop it. Nothing in either the plaintiff's testimony or the testimony of Talmadge King indicated that the drum was negligently rolled. Moreover, the evidence is compelling that the plaintiff voluntarily participated in the unloading process and therefore assumed the consequences of his actions.

Even if the verdict in plaintiff's favor were allowed to stand, the amount of the verdict, $154,000, is excessive and unsupported by the weight of the evidence. First, the Court concludes insufficient evidence was offered indicating the plaintiff suffered any substantial loss of income or diminution in his earning capacity as the result of his medical

problems. Second, although there was evidence that plaintiff's injuries may be permanent and he will not likely be able to jog in the future, the plaintiff's doctors also testified he will be able to lead a relatively normal work and recreational life and he will be able to continue to swim, cycle, walk and canoe. Third, although the plaintiff claimed he would incur future medical expenses for neck surgery, he failed to introduce credible evidence that it is likely he will undergo such surgery or that he has any medical condition which will require such surgery. Finally, the plaintiff did not introduce credible evidence supporting a substantial award for any possible future pain and suffering. Given the lack of evidence on the extent of the plaintiff's damages, the Court concludes

that the jury verdict of $154,000 is excessive and does not represent reasonable and sound judgment by the jury.[1] Consequently the Court conditionally grants the defendant's motion for a new trial.

In summary, the defendant's motion for judgment notwithstanding the verdict is granted. The defendant's alternative motion for a new trial is also conditionally granted pursuant to Fed. R. Civ. P. 50(c).

IT IS SO ORDERED.

KAREN LeCRAFT HENDERSON
UNITED STATED DISTRICT JUDGE

Columbia, South Carolina

January 28, 1987

[1]The Court also notes that the jury was confused about what damages it could

properly consider. Early in its deliberations, the jury sent a note to the Court asking, "[i]f we find for the plaintiff, do we set both punitive and actual damages." This action was tried on a negligence theory alone, and absolutely no allegation was made during trial that the defendant or its employees acted recklessly or with gross negligence, nor were punitive damages ever mentioned. The Court did respond in writing that the jury could not award punitive damages and subsequently reinstructed the jury on the law relating both to negligence and to actual damages. While this incident is insufficient in and of itself to require a new trial, it does indicate that the jury was confused. See Barnett v. Love, 294 F.2d 585, 587 (4th Cir. 1961).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-2013

G. ROBIN OSCAR,

Filed
April 27, 1988

Plaintiff-Appellant,

v.

CLOVERVALE FOODS PROCESSING, INC.,

Defendant-Appellee.

On Petition for Rehearing

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips, with the concurrence of Senior Judge Butzner and Justice Lewis Powell, United States Supreme Court (Retired), sitting by designation.